COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026560-00**

John Sullivan	Employee
Phillips Analytical, Inc.	Employer
Travelers Indemnity Company of Connecticut	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Costigan)

APPEARANCES
Martin Kantrovitz, Esq., for the employee
James A. Garretson, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on appeal

CARROLL, J. In this appeal, the insurer maintains that the judge's determination of average weekly wage was erroneous as a matter of law, and that the judge erred in finding the employee disabled after he began looking for work. We affirm the decision as to average weekly wage, but recommit the case for a further vocational analysis pursuant to G. L. c. 152, § 35D.

John Sullivan, thirty-eight years old at the time of the claimed injury, had been working on a temporary basis as an assembly technician for the employer for approximately one month at the time of his industrial accident. (Dec. 4.) On June 29, 2000, he was sitting at his work station when a co-worker dropped a heavy crate a few feet behind him. The noise startled him, and he swung around, jerking his neck. He immediately experienced a sharp pain in the left side of his neck, extending to his left arm. Over the next few days, his symptoms worsened, culminating in paralysis and numbness of his left side. He went to the emergency room on July 7, 2000, and was referred to Dr. Robert Cantu for treatment. (Dec. 6.) On August 30, 2000, the employer informed him that his services were no longer needed. His last payday for the employer was June 30, 2000. (Dec. 4.)

On October 23, 2000, Dr. Cantu released Mr. Sullivan to light duty. He immediately began working at a company called Palomar Medical, (Dec. 4, 6), at a "similar job but with different physical requirements and pay." (Dec. 7.) After about seven months, in May 2001, the employee lost feeling in his left arm and began having spasms. (Dec. 4.) He was out of work from June 15, 2001, (Tr. 51, 56; see Amendment to Decision, dated June 18, 2003), until October 2, 2001, when he returned to work at Palomar. He worked there for approximately one month, until he was laid off in the first week of November 2001, along with about twenty other employees. (Dec. 4.)

The employee was examined pursuant to § 11A, by Dr. Daniel Bienkowski, on April 25, 2001.[1] The impartial physician diagnosed a C5-6 left-sided disc rupture and a left C6 radiculopathy, causally related to the June 2000 work accident. He concluded that the injury was "partial and permanent" and that the employee could work with lifting restrictions. (Dec. 7-8.) The employee filed a motion to submit additional medical evidence, which the judge allowed.[2] (Dec. 3; Tr. 4-5.) Both the employee and the insurer submitted additional medical evidence. (Dec. 1-2.)[3]

Based on "the medical testimony and various medical reports," (Dec. 7), the judge found that the employee sustained an injury at work in June 2000. At

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[1] The judge neither listed the impartial report as an exhibit in the exhibit list at the beginning of the decision, (Dec. 1-2), nor marked it as such in the board file. However, the transcript reveals that he intended to include it as a statutory exhibit, (Tr. 61), and he clearly considered and adopted it. (Dec. 3, 6-8.)

[2] The judge stated that no motions were filed on inadequacy or complexity regarding the § 11A report, but the employee's motion, though not specifically arguing that the report was inadequate, alleged as much. (See "Motion of the Employee to Submit Additional Medical Evidence.") We take judicial notice of this motion contained in the board file, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002), and referred to in the judge's decision. (Dec. 3.)

[3] The judge stated in the decision that only the employee submitted additional medical evidence, (Dec. 3), but listed a report of Dr. Fullerton as *Ins*. Exh. 2. (Dec. 2.)

the time of hearing, the judge found the employee "permanently partially disabled." Id. The judge gave the impartial report "prima facie" status from the date of the examination on April 25, 2001 and continuing, and adopted Dr. Bienkowski's findings in full. He noted that he had looked at "various exhibits of medical evidence submitted by both parties and [found] that in general they comport with the findings of the 11A." (Dec. 7-8.)

Based on the employee's testimony and the pay stub he submitted, the judge found that the employee's average weekly wage was $1,600.00. The judge stated that he was applying the formula approved by the court in Rice's Case, 229 Mass. 325 (1918), interpreting the "words 'average weekly wages' . . . in their common and ordinary sense . . . by dividing the total amount earned by the number of weeks of employment." (Dec. 5, quoting Rice's Case, supra at 328.)

The judge found the employee "permanently and totally disabled" from June 29, 2000 until September 26, 2000, and from June 15, 2001 until October 1, 2001, and awarded him § 34 benefits of $749.69 per week, based on an average weekly wage of $1,600.00, during those time periods. (Dec. 9.) He further awarded the employee weekly § 35 benefits of $383.10 from September 9, 2000 through June 14, 2001, and from October 2, 2001 through November 8, 2001, based on an earning capacity of $961.50 a week; and § 35 benefits of $562.26 from November 9, 2001 to date and continuing, based on an earning capacity of $400.00 per week. (Amendment to Decision dated June 18, 2003.)[4]

[4] In his original decision, the judge awarded § 35 benefits from *September 27, 2000* to June 14, 2001; and from October 2, 2001 to date and continuing at the rate of *$720.00* per week, based upon an earning capacity of *$400.00*. In the first amendment to the decision, the periods of the § 35 award and the earning capacity remained the same, but the benefit rate changed from $720.00 per week to *$562.00* per week. (Amendment to Decision, dated May 2, 2003). The insurer then requested by letter that the judge reconsider the § 35 periods and rates ordered based upon the employee's actual earnings at Palomar. (Letter dated May 7, 2003 to administrative judge from insurer counsel.) We take judicial notice of this letter, contained in the board file. See Rizzo supra. Following receipt of that letter, the judge issued a second amendment to his decision, as described above. It is not clear where the start date for § 35 benefits of September 9, 2000 originated, since the original decision and the first amended decision begin § 35 benefits

The insurer appeals, arguing first that the judge's finding that the employee's average weekly wage was $1,600 is incorrect as a matter of law because the employee had not worked long enough to establish this amount as his average weekly wage. In addition, the insurer contends, the judge's method of calculating average weekly wage was incorrect because the employee did not offer into evidence any information regarding the pay of similarly situated employees. Thus, says the insurer, the employee has failed to meet his burden of proving average weekly wage.

The average weekly wage of an employee is a question of fact for the administrative judge. More's Case, 3 Mass. App. Ct. 715 (1975) (rescript op.); Caldwell v. Shamrock Enterprises, 12 Mass. Workers' Comp. Rep. 498, 500 (1998). Of course, the employee has the burden of proof on this issue, as well as on all other elements of his claim. Radke v. Eastham Foundations, 7 Mass. Workers' Comp. Rep. 197, 204 (1993). However, the employee's testimony is sufficient to satisfy that burden. Id. Here, the judge based his determination as to average weekly wage on the employee's credible testimony, as well as on the pay stub he submitted. (Dec. 6.)

The insurer's complaint that the employee did not meet his burden of proof because he failed to offer into evidence the wages of a similarly situated employee ignores the fact that, in numerous cases, the courts and the Board have endorsed alternative methods of calculating average weekly wage, where the method set forth in the statute is not applicable, or where evidence has not been introduced which would allow the calculation of average weekly wage in accordance with the statute. See Carnute v. Stockbridge Golf Club, Inc., 17 Mass. Workers' Comp. Rep. 214, 218 (2003), and cases cited therein. One approved alternative method is to divide the total amount earned by the number of weeks of employment, as the

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on September 27, 2000. Moreover, the insurer's May 7, 2003 letter states that the employee began work for Palomar on October 23, 2000.

judge did here. (Dec. 5.) See Carnute, supra; Rice's Case, supra; Robichaud's Case, 292 Mass. 382 (1935). While a period of two to four weeks is not always a sufficient length of time on which to base average weekly wage, we believe that, under the circumstances here, it reflects the employee's "probable future earning capacity," which is the objective of wage calculation.[5] Carnute, supra at 218, quoting Gunderson's Case, 423 Mass. 642, 644 (1996), quoting 2 A. Larson, Workmen's Compensation § 60.11(f) at 10-647-10-648 (1996). Though the employee was hired as a temporary employee, his unrebutted testimony was that he "was under the impression [that he would] probably be hired full time." (Tr. 44.) In addition, the employer offered no evidence that there was a definite termination date contemplated, and the judge found that the employee stopped work for the employer due to his industrial injury. (Dec. 7.) Therefore, we affirm the judge's finding basing the employee's average weekly wage on his weekly earnings during the brief time he worked for the employer. See Ethier's Case, 286 Mass. 139 (1934)(where no evidence was introduced of the average weekly wages of a full-time worker in employee's position, court upheld determination that employee's average weekly wage was the amount he earned for the two days he worked before he was injured); Morris' Case, 354 Mass. 420 (1968)(average weekly wage of employee killed on the first day of his job was based on his projected full-time hourly rate). Compare Bunnell v. Wequasset Inn, 12 Mass. Workers' Comp. Rep. 152 (1998)(employee's earnings in seasonal landscaping job should be divided by fifty-two rather than by the number of weeks she actually worked where her job had always been of a determinate duration).

[5] Though the judge's findings are somewhat muddled regarding how many weeks the employee worked, (Dec. 4-5), it is of no moment. The employee's testimony makes it clear that the pay stub he submitted showing $3,200 of earnings represented the two-week period from June 19, 2000 through July 2, 2000, which would yield an average weekly wage of $1,600. (Tr. 14.) If the judge's calculations were based on four weeks of earnings, the result would be the same, since the pay stub showed year-to-date earnings of $6,400.00, (Employee Exh. 6), and the judge found that the employee had

Next, the insurer argues that the judge erred in finding that the employee was disabled from working from approximately October 2, 2001, when he began applying for jobs. The insurer maintains that the only reason the employee did not return to work for the employer was because the job was a temporary one, and that the only reason he did not return to work at Palomar Medical was because he was laid off for economic reasons. (Insurer brief, 11.) Finding a number of errors in the judge's findings on extent of incapacity and earning capacity, we recommit the case for further findings.

First, the judge gave prima facie effect to the impartial opinion for the period beginning with the examination on April 25, 2001, but did not indicate on what medical evidence he relied in finding the employee totally or partially incapacitated prior to the impartial examination. He stated only that he had "looked at various exhibits of medical evidence submitted by both parties and . . . in general they comport with the findings of the 11A." (Dec. 8.) We should be able to tell on what medical evidence, if any, the judge has based his award. Cordi v. American Saw & Mfg. Co., 16 Mass. Workers' Comp. Rep. 39, 46 (2002); Allen v. Luciano Refrigeration, 15 Mass. Workers' Comp. Rep. 346 (2001). Here, we cannot tell that for the period prior to the impartial examination. Therefore, the judge must clarify his findings. See Beverly v. M.B.T.A., 17 Mass. Workers' Comp. Rep. 621, 624 (2003).

In addition, in determining the employee's earning capacity, the judge has failed to perform an adequate vocational analysis pursuant to § 35D. During the approximate period of time the employee worked for Palomar, the judge awarded him partial incapacity benefits based on what appear to be his actual earnings, $961.50. (Amendment to Decision dated June 18, 2003.) However, there is no discussion of what the employee's job duties at Palomar were, other than that they were different from the employee's job duties for the employer, (see Dec. 7), or

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worked for the employer for about a month at the time of his injury on June 29, 2000. (Dec. 4; see Tr. 9.)

why the employee was limited to earning this amount. In addition, beginning on November 9, 2001, after the employee was laid off from Palomar, the judge assigned the employee an earning capacity of $400.00 per week, with no explanation as to why his ability to earn wages had changed. (Amendment to Decision dated June 18, 2003.)

The actual wages the employee earns are not dispositive of his earning capacity. Hicks v. Commonwealth Registry of Nurses, 17 Mass. Workers' Comp. Rep. 375, 376-377 (2003). Section 35D directs judges to use the greatest of the amount of the employee's actual earnings, § 35D(1), or the amount he is capable of earning with a reasonable use of all his faculties, § 35D(4). Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 251 (2002). "An accurate § 35D(4) analysis requires specific findings, based on the evidence submitted, as to the actual amount the employee is capable of earning post-injury." Id. at 252, citing Kelley v. General Elec. Co., 12 Mass. Workers' Comp. Rep. 476 (1998). Moreover, the judge must make subsidiary findings analyzing the employee's " 'work-related medical condition and its impact on ability to earn in the context of the employee's education, training, age and experience.' " Beverly, supra at 624, quoting Peters v. City of Salem Cemetery Dept., 11 Mass. Workers' Comp. Rep. 55, 58 (1997). See Scheffler's Case, 419 Mass. 251, 256 (1994).

The judge here has not done that, either for the periods the employee worked for Palomar,[6] or for the ongoing period after his layoff from that company. On recommittal, he should make such additional subsidiary findings as will

[6] We do not read the insurer's letter to the judge dated May 7, 2003, requesting that he reconsider the § 35 periods and rates based upon the employee's actual earnings at Palomar, as stipulating to the employee's partial incapacity or earning capacity during that time, where it is clear that, at hearing, the insurer raised disability and extent of incapacity. (See Dec. 2.) Rather, the letter seems aimed at correcting the judge's calculations during the time the employee worked for Palomar, as well as the employee's actual dates of employment for Palomar.

support his determination. Moreover, if the reduction in the employee's assigned earning capacity from $961.50 per week to $400 per week is to be supported, "[t]he employee must show, and the judge's findings should illustrate, a work-related change or deterioration in his condition that reduces his ability to work." Jackson v. Raytheon Co., 17 Mass. Workers' Comp. Rep. 166, 170 (2003), citing Foley's Case, 358 Mass. 230, 232-233 (1970); and L. Locke, Workmen's Compensation § 345 (2d ed. 1992). See also Silva v. J. Masterson Constr. Co., 17 Mass. Workers' Comp. Rep. 444, 446 n.1 (2003), quoting Manley's Case, 282 Mass. 38, 39 (1933)(" 'compensation cannot be awarded for lack of employment due to depressed business or want of demand for labor; diminished earning capacity resulting from the injury must be shown' ").

This case is recommitted to the administrative judge for further findings consistent with this decision.[7]

So ordered.

Martine Carroll	William A. McCarthy	Patricia A. Costigan
Administrative Law Judge	Administrative Law Judge	Administrative Law Judge

Filed: **July 12, 2004**

[7] We note a number of other errors or inconsistencies which the judge should correct on recommittal. For instance, the judge found the employee "permanently and totally disabled" for two closed periods of time. (Dec. 8.) In addition, he awarded partial incapacity benefits for a period of time when he had already awarded total incapacity benefits: September 9, 2000 – September 26, 2000. (See Amendment to Decision dated June 18, 2003 and Dec. 9.) He found that the employee began work at Palomar on October 23, 2000, (Dec. 4), but awarded § 34 benefits only until September 26, 2000.